(1)

SUPREME COURT, U.S.
FILED

No. 00 920 SEP 21 2000

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ALPHONSO SOLOMON; JANET M. SOLOMON,
PETITIONERS

VS.

ROBERT MILBANK, JR.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Alphonso Solomon
Janet M. Solomon
(Petitioners Pro Se)
213 Sandy Creek Place
DeSoto, Texas 75115-5354
(972) 223-6608

6 1 P

I. QUESTION(S) PRESENTED

While the Bankruptcy Code establishes duties of bankruptcy trustees, the Code does not set forth any standards governing the liability of trustees for the breach of these duties. And, the U.S. Supreme Court has never discussed the issue of what was the standard for imposing liability on a trustee for breach of fiduciary. Thus, as a matter of law, the Fifth Circuit among the other circuits that are evenly split, has misinterpreted the law, and made enforcement of fiduciary duties against a trustee more difficult. These same courts are even overlooking federal rules of civil procedures in order to shield bankruptcy trustees from personal liability.

1. Whether a bankruptcy trustee can be held personally liable for not only intentional but also negligent violations of duties imposed upon him by law?
2. Whether a bankruptcy trustee must receive specific orders instead of general orders to be entitled to absolute immunity?
3. Whether a bankruptcy and district court must notify the parties when it takes judicial notice of a fact other than at the request of a party, in order, to afford them an opportunity to be heard? If not, was this a violation of the Solomons'due process rights?
4. Whether a bankruptcy court can substantially depart from its Scheduling Order to the prejudice of a party? If not, was this a violation of the Solomons' due process rights?iii

II. TABLE OF CONTENTS

QUESTIONS PRESENTED..... i
TABLE OF CONTENTS..... ii
TABLE OF AUTHORITIES..... iii
PETITION FOR A WRIT OF CERTIORARI..... 1
OPINIONS BELOW..... 1
JURISDICTION..... 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1
STATEMENT OF THE CASE..... 2
REASONS FOR GRANTING THE WRIT..... 5
CONCLUSION..... 16

III. INDEX TO APPENDICES

APP. A - Decision of the United States Court of Appeals - Fifth Circuit..... 1
APP. B - Order of the United States Court of Appeals - Fifth Circuit 3
APP. C - Decision of the United States District Court Northern District of Texas (Dallas).... 5
APP. D - Decision of the United States Bankruptcy Court Northern District of Texas (Dallas).... 17
APP. E - Scheduling Order of the United States Bankruptcy Court Northern District of Texas (Dallas) 27
APP. F - Decision of the United States Dallas District Court Northern District of Texas (Dallas)..... 31
APP. H - Decision of the United States Bankruptcy Court Northern District of Texas (Dallas)... 38

IV. TABLE OF AUTHORITIES CITED

CASES	PAGES
In re Center Teleproduction, Inc., 112 Bankr. 567 (Bankr. S.D.N.Y. 1990)..	8
Cooperative de Ahorro v. Kidder, Peabody & Co., 993F.2d269273(1stCir.1993)	13
Ford Motor Credit v. Weaver, 680 F.2d 451 (6th Cir. 1982)	7
In re Gorski, 766 F.2d 723 (2nd Cir. 1985)	8,10
Hall and Baldrian v. Perry (In re Cochise College Park, Inc.), 703 F.2d 1339, 1357 (9th Cir. 1983)	7,8,10
Hoffman - LaRoache, Inc. V. Sterling, 493 U.S. 165, 173, 110 S.Ct 482, 487 (1989)	14
Lopez-Stubbe v. Rodriguez-Estrada (In re San Juan Hotel Corp.) 847 F.2d 942 (1st Cir. 1988)	10
Mosser v. Darrow, 341 U.S. 267, 71 S.Ct 680, 95 L.ED (1951)	6,7,8,9,10
In re Center Teleproduction, Inc., 112 Bankr. 567 (Bankr. S.D.N.Y. 1990)	8
Red Carpet Corp. V. Miller, 708 F.2d 1576, 1578 (11th Cir. 1983)	8
Sherr v.Winkler, 552 F.2d at 1375 (10th Cir. 1977)	7,8,9
U.S. v. First National Bank of Circle, 652 F.2d 882 (9th Cir. 1981)	15
Yadkin Valley Bank * Trust Co. v. McGee, 819 F.2d 74 (4th Cir. 1987)..	7

TREATISE	
Black's Law Dictionary,1 441 (6th ed. 990)	9
Nat'l Bankr. Review Comm'n Final Report 3.3.2 at 859 (1997)	6
21 Charles A. Wright & Kenneth W. Graham, Fed. Prac. & Proc. Evid. S 5109 (R 201)(1977)	12

STATUTES AND RULES

11 U.S.C. 704(1) (1994) 2,6
28 U.S.C. 1254(1) 1
Federal Rule of Evidence 201(d)..... 2,11,12,13
53 Tex Jur 3rd, Negligence 5 (1987) 2,9
FRCP 1 14
FRCP 16..... 2,13
Model Code of Evidence, Rule 804(1) 12
U.S.C. Const. Amend. 5 1,2,6,10,11,13
U.S.C. Const. Amend. 14 1,2,6,10,11,13

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

V. OPINION BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

VI. JURISDICTION

The date on which the United States Court of Appeals decided my case was June 23, 2000.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Due Process Of Law - "A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. Also, a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious.

The constitutional guarantee of due process of law, founded in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from

arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The Due Process Clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "be deprived of life, liberty, or property, without due process of law." This amendment restricts the powers of the federal government and applies only to actions by the federal government. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, applies to the state government."

2. Federal Rule of Civil Procedure 16 - "The purpose of the scheduling conference and order is to set deadlines for completing the principal pretrial steps, motions, and order. "

3. Treatise - 53 Tex Jur 3rd, Negligence 5 (1987) - The four essential elements which must be proven in order to establish a case of negligent against the defendant are (a) that the trustee owed a duty to plaintiff ; (b) that the defendant breached that duty; (c) that the defendant's conduct was the approximate cause of the plaintiff's injury; and (d) that the plaintiff suffered damages.

4. Federal Rule of Evidence 201 – This rule governs only judicial notice of adjudicative facts. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.

5. 11 U.S.C. 704(1) - The Bankruptcy Code provides that a Chapter trustee shall, inter alia," collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest."

VIII. STATEMENT OF THE CASE

On May 20,1994, Alphonso Solomon ("Debtor") filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On November 15, 1994, the Debtor's case was converted to a Chapter 7 case, and Milbank was appointed the Chapter 7 Trustee. Milbank is also a licensed attorney.

On February 9, 1995, the case was reconverted to a Chapter 11 case and a Plan of Reorganization was filed. Milbank was retained as Chapter 11 Trustee. On December 15, 1995, the Debtor's Plan of Reorganization was modified and confirmed, and Milbank was made the Liquidating Trustee. On May 3, 1996, the case was reconverted to a Chapter 7 case and Milbank was appointed the Chapter 7 Trustee.

On April 19, 1996, Alphonso Solomon, debtor and his non-debtor wife Janet M. Solomon (collectively "Plaintiffs-Appellants") filed a lawsuit against Milbank ("Personally and Individually") and William Chris Wolffarth and Jenna V. Unell (the "Trustee's Attorneys") in the 298th Judicial District Court, Dallas County, Texas, asserting causes of action of negligence, gross negligence and breach of fiduciary duty in connection with the Trustee's administration of the Debtor's bankruptcy estate and seeking damages of $2 million.

On April 29, 1996, defendants removed the case to the U.S. Bankruptcy court for the Northern District of Texas. Defendants filed separate motions to dismiss, or alternatively for summary judgment. Summary judgment was granted to the Trustee's attorneys and dismissal to Milbank on July 16, 1996 for no standing to sue the bankruptcy trustee and his attorneys. Appendix H. The Solomon's then appealed to the U.S. District Court.

On March 5,1997, the District Court entered its decision affirming the summary judgment for Trustee's attorney and vacating and remanding the dismissal of Plaintiffs' actions against Milbank. See Appendix F.

On June 19, 1997, the Bankruptcy Court directed Plaintiffs to file and serve on Milbank an amended complaint alleging individual claims against Milbank, consistent with the District Court's decision and for Milbank to file an amended answer within 30 days of the date of the amended complaint. On August 6, 1997 the Bankruptcy Court granted Plaintiffs a 30 day exten
sion to file their amended complaint.

On August 19, 1997, the Solomon's filed and served their Amended Complaint in compliance with the Court's Order entered June 19, 1997. Then, on September 2, 1997, the Solomon's filed and served their Second Amended Complaint.

On September 11, 1997, Milbank filed his Motion to Dismiss which was heard at the Scheduling conference on September 12, 1997.

On September 12, 1997, the Solomon's filed and handed-delivered their Plaintiffs' Response To Motion To Dismiss to Milbank before the scheduling conference.

On September 12, 1997, a Scheduling conference was held. All parties were present. And on September 29, 1997, the Court entered its Scheduling Order per the scheduling conference held on September 12, 1997. Appendix E.

On October 8, 1997, Milbank filed his Second Amended Motion to Dismiss, Or, In The Alternative For Summary Judgment. This was the first time that he filed this motion for summary judgment on the amended complaint. Only, his Motion To dismiss was filed on September 10, 1997 and heard on September 12, 1997. On December 2, 1997, the Solomon's filed and served their Plaintiffs' Response to Mil bank's Second Amended Motion To Dismiss, Or, In The alternative For Summary Judgment.

On December 3, 1997, a hearing was held on Mil bank's Motion To Dismiss, Or, In The alternative For Summary Judgment.

On December 10, 1997, Milbank had just filed his Answer To Plaintiffs' Second Amended Complaint after over three months.

On January 6, 1998, The Solomon's filed and served their Plaintiffs' second Response to Mil bank's Second Amended Motion To Dismiss, Or, In The Alternative For Summary Judgment.

On March 6, 1998, The Bankruptcy Court entered its Order of Summary Judgment And Dismissal of Plaintiffs'

Complaint. Appendix D. This Order is the subject of this Appeal.

On March 13, 1998, Plaintiffs-Appellants timely filed their Notice of Appeal to the District Court.

On September 14, 1999, the District Court entered its Order affirming the opinion of the Bankruptcy Court and denying Mil bank's motion to Amend the Record on Appeal. Appendix C.

On June 7, 2000. The Fifth Circuit Court of Appeals entered its Order denying (1) Mil bank's Motion for Judicial Notice; (2) Mil bank's Alternative Motion to supplement the Record on Appeal; (3) Solomons' Motion to Strike the statement of facts in section "A" in Mil bank's Brief; and (4) Solomons' Motion for Leave to file amended response to Mil bank's motion for judicial notice and supplement the record. Appendix B.

On June 23, 2000, the Fifth Circuit Court of appeals entered its Order affirming the opinion of the District Court and Bankruptcy Court. Appendix A.

This Petition for a Writ Certiorari followed.

IX. REASONS FOR GRANTING THE PETITION

1. Whether a bankruptcy trustee can be held personally liable for not only intentional but also negligent violations of duties imposed upon him by law?

2. Whether a bankruptcy trustee must receive specific orders instead of general orders to be entitled to absolute immunity?

Certiorari should be granted because, only the Supreme Court can resolve the conflict among the circuit courts' decisions and protect all the citizens of the United States constitutional right to due process when they have to go through the bankruptcy court. The decision of the lower court in our case is erroneous and it is of national

importance in having the Supreme Court decide the related questions involved in our case. All the circuits courts are evenly split as to the proper standard for bankruptcy trustee liability. And, all the circuit courts that do not believe the bankruptcy trustee can be personally liable for intentional and negligent violations of his duties under the law are violating the debtor, non-debtor spouse and unsecured creditors' constitutional right to due process. These same courts are even overlooking federal rules of civil procedures including the "notice and opportunity to be heard" requirement which is guaranteed under the Fifth Amendment of the U.S. Constitution as shown throughout the entire section on reasons to grant this writ. These courts are doing this in order to shield bankruptcy trustees from personal liability at the expense of the debtor, non-debtor spouse and unsecured creditors as shown in our case.

Even the Final Report of the National Bankruptcy Review Committee described the state of the law on the trustee standard of care question as a "crazy quilt' of decisions. See Nat'l Bankr. Comm'n Final Report 3.3.2 at 859 (1997). The Commission observed that the difficulty arose from conflicting policy considerations; too little protection might expose a trustee to excessive personal liability and dissuade capable people from becoming trustees, while too much protection would jeopardize the goal of responsible estate management. See id. At 860-61.

While the Bankruptcy Code establishes duties of bankruptcy trustees, the Code does not set forth any standards governing the liability of trustees for the breach of these duties. 11 U.S.C. 704(1). With all due deference, the Tenth and Sixth Circuits misconstrued Mosser v. Darrows. The U.S. Supreme Court never discussed the issue of what was the standard for imposing liability on a trustee for breach of fiduciary duty. Thus, as a matter of law, these courts have misinterpreted the law, and made the enforcement of fiduciary duties against a trustee more difficult. Worst of all beneficiaries of the Estate - the creditors and debtor - find their actions against trustees for

breach of fiduciary duties stymied by courts convinced that the trustee's careless acts were within the scope of the trustee's authority

A. The Framework For Personal Liability Of Bankruptcy Trustee

(1) The standard for liability of a bankruptcy trustee was established by the Supreme Court in the case of Mosser v. Darrow.

(2) The Mosser case subsequently gave rise to a split among the circuits as to the proper standard for bankruptcy trustee liability.

(3) The Tenth Circuit in Sherr v. Winkler refused to hold a bankruptcy trustee personal liable for negligent acts and interpreted Mosser as imposing personal liability only where the trustee "acts willfully and deliberately in violation of his fiduciary duties."

(4) The Ninth Circuit in Hall and Baldrian v. Perry (In re Cochise College Park, Inc.) held, however, that "although a trustee is not liable in any manner for mistakes in judgment where discretion is allowed, he is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law."

(5) Despite the split among the circuits, however, a bankruptcy trustee can, in essence, be personally liable for intentional and negligent violations of his duties under the law.

B. How The Other Circuit Courts Followed The Leading Circuit Courts

The Fourth, Sixth and Fifth Circuits have followed the Tenth Circuit's reading of Mosser. See Yadkin Valley Bank & Trust Co. V. McGee, 819 F.2d 74 (4th Cir. 1987); Ford Motor Credit Co. V. Weaver, 680 F.2d 451 (6th Cir. 1982) citing the Fifth Circuit appears to be the results of semantically distinction and misreading of the Mosser case by the Sherr Court.

The Sherr Court read Mosser imposing personal

liability for willful and deliberate violations of his duties, and official liability for acts of negligence. Sherr , 552 F.2d at 1375 (emphasis added). Trustees who were held to be liable in their "official capacity" were surcharged by the court. Thus, the Tenth Circuit's distinction between "personal" and "official" liability is for the most part nonexistent. Indeed, the Tenth Circuit's test for "official" liability for negligence is the same other circuits use to impose general liability on a bankruptcy trustee namely the degree of care required of an ordinary prudent person serving in such capacity. Sherr, 552 F.2d at 1375.

Furthermore, to the extent that the Sherr court read Mosser as holding that bankruptcy trustees were not personally liable for negligent acts, its reading of that case was incorrect. Because the trustee in Mosser hired the employees and knew of their actions, the court did not even reach the question of negligence because the trustee's actions were intentional. Mosser, 341 U.S. At 272. The Mosser court stated that "the question whether the trustee was negligent in not making detailed inquiries into the employee's operations is unimportant, because he had given blanket authority for the operation.

Quickly on the heels of Sherr Court, other courts rejected the Sherr Court's misapplication of Mosser. The Cochise Court stated that a trustee must "exercise that measure of care and diligence that an ordinary prudent person under similar circumstances would exercise. Hall and Baldrian v. Perry (In re Cochise College Park), 703 F.2d 1357 (9th Cir. 1983). The Second and Eleventh Circuit adopted the Ninth Circuit's approach. In re Gorski, 766 F.2d 723 (2nd Cir. 1985); Red Carpet Corp. V. Miller, 708 F.2d 1576, 1578 (11th Cir. 1983). In re Center Teleproductions, Inc., 112 Bankr. 567 (Bankr. S.D.N.Y. 1990) where trustee negligently fails to discover his agent's negligence, negligently obtains a court order, or negligently or willfully carries out a court order he knew or should have known he wrongfully procured , personal liability will attach.

These courts also differentiate between surcharges and personal liability (against the Sherr Court's notion that surcharge and personal liability are one in the same), presumably relying on the Mosser Court's statement that "the most effective sanction for good administration is personal liability for the consequences of forbidden acts." 341 U.S. At 274. Whether or not negligent conduct is "forbidden" is the question, not part of the answer. More importantly, the reasoning depends on a misunderstanding of the word "surcharge," which is most fittingly defined as "the imposition of personal liability on a fiduciary for willful or negligent conduct in the administration of his fiduciary duties." Black's Law Dictionary, 1441 (6th ed. 1990). Given this definition, there is simply no principled way after Mosser to avoid the conclusion that a bankruptcy trustee can be personally liable for negligent breach of fiduciary duty.

Also, State statutes like in Texas have four elements which must be proven in order to establish a case of negligence against the Trustee as the Solomons laid out in the Complaint - duty, breach, proximate cause, and damages suffered. 53 Tex Jur 3rd, negligence 5 (1987).

C. IMMUNITY FOR BANKRUPTCY TRUSTEE

Once again, the starting point for our analysis is Mosser. In that case, the Court outlined a mechanism through which a bankruptcy trustee may avoid personal liability:

> The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties,as to matters which involve difficult questions of judgment .....{If the challenged arrangement} was of advantage to the trust, this might have been fully disclosed to the court and the creditors cited to show cause why it should not have been openly authorized.

Mosser, 341 U.S. At 274. Following Mosser, First Circuit Court has explained that a trustee acting with the explicit

approval of a bankruptcy court is entitled to absolute immunity, as long as there has been full and frank disclosure to creditors and the court. See Lopez-Stubbe, 847 F.2d at 942 (citing Mosser, 341 U.S. At 274). While some courts have given absolute immunity to a bankruptcy trustee with only general approval orders from the court. An explicit approval order is an order that is fully and clearly expressed; leaving nothing merely implied. Only explicit not general orders should protect bankruptcy trustee.

The rules to be drawn from these cases in the Ninth and Second Circuit Courts, a bankruptcy trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or pursuant to a court order. Where the trustee negligently fails to discover his agent's negligence, negligently obtains a court order, or negligently or willfully carries out a court order he knew or should have known he wrongfully procured, however, personal liability will attach. Mosser v. Darrow, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951); In re Gorsksi, 766 F.2d 723, 727 (2nd Cir. 1985), citing, Hall and Baldrian v. Perry (In re Cochise College Park, Inc.), 703 F.2d 1339, 1357 (9th Cir. 1983). Also, an ex parte order does not immune a trustee from claims of those who had no knowledge or notice of it, Cochise, 703 F.2d at 1357 n.25, since they could not appeal and therefore could not be said to be collaterally attaching the order. Also, Due Process prohibits use of collateral estoppel in stances in which plaintiff was neither party nor in privity with party in prior case, in that plaintiff has never been afforded opportunity to present its evidence and arguments on claim. U.S.C.A Const. Amend. 5.

The Solomons were never given an opportunity to complete their discovery and be heard pursuant to the Scheduling Order (Appendix E) to gather sufficient evidence to support their claims, non-responsive answers to claims by Milbank and general, and ex parte orders that are not a part of the record on appeal (and not presented or heard at the summary judgment hearing). The record is

devoid of anything to show that all the issues could have been determined by summary judgment. At the summary judgment hearing, over the oral and written objections of the Solomons along with their affidavits for hearing, the Judge stated that he was taking all parties' comments under advisement. Milbank even failed to address all the claims in his motion for summary judgment which constituted a waiver of the unaddressed claims. And, the Judge never change the discovery deadline nor took judicial notice of any facts. Then, the Solomon's were taken by surprise when the Judge issued an Order for Summary Judgment for Milbank on March 3, 1998. This was a violation of the Solomons' constitutional due process rights. Reversal is necessary when the bankruptcy court did not provide the Solomon with notice and opportunity to be heard on the judicial noticed items in it Order for Summary Judgment.

3. **Whether a bankruptcy and district court must notify the parties when it takes judicial notice of a fact other than at the request of a party, in order, to afford them an opportunity to be heard? If not, was this a violation of the Solomons' due process rights?**

The Fifth Circuit and the lower courts have entered its decision in this case that has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. This is a Due Process of Law question which is covered in the Federal Rules of Evidence - FRE 201. Judicial Notice of Adjudicative Facts. Due Process of Law is a fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. It is found in the in the Fifth and Fourteenth Amendments to the U.S. Constitution which prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property.

The sine qua non of the due process right to a hearing is notice to a party that action is being taken that effects his interests. Where the opponent request that judicial notice be taken, the party will receive notice by being served with a copy of the request. This was not done by the Respondent in this case. However, where the court takes judicial notice sua sponte, it is possible that the party adversely affected might not learn of this until the judge delivered his decision as the Petitioners in this case. To avoid this, the Model Code of Evidence, Rule 804(1) required the court to inform the parties that it was considering taking judicial notice so as to afford them an opportunity to be heard. This opportunity is owed as a matter of fairness and also to prevent flagrant errors. Such advance notice will also avoid constitutional questions.

At the hearing, a party is entitled to contest either the propriety of taking notice or the correctness of the fact to be noticed or both. In order to do this , the party must be given the opportunity to present to the court information pertinent to either of these questions, including books, affidavits of persons learned in the subject matter, and even the testimony of witnesses. At the hearing, the burden is on the party proposing that notice be taken to show that the requirements for taking judicial notice are met by producing information sufficient to show that the fact is a matter of common knowledge or that the source is one whose accuracy cannot reasonably be questioned. If the party fails to provide to provide sufficient information, the court may decline to take notice or consult others of information on its own before deciding the question. 21 Charles A Wright & Kenneth W. Graham, Fed. Prac. & Proc. Evid. S 5109 (R 201) (1977).

Milbank did not furnish the Bankruptcy Court with the necessary information, as required by Federal Rule of Evidence 201(d) and it was not heard. This is why no such information is a part of the record on appeal and Milbank has no other evidence in the record to support a summary

judgment. And, the Solomon's were never notified by either the Bankruptcy or District Court that it was taking judicial notice of any facts nor afforded an opportunity to be heard on any alleged facts by Milbank or the Courts. When a bankruptcy or district court takes judicial notice of a fact other than at the request of a party, it should notify the parties that it is doing so and afford them an opportunity to be heard. Cooperativa de Ahorro v. Kidder, Peabody & Co., 993 F.2d 269, 273 (1st Cir. 1993). FRE 201(e). In fact , the District Court and the Fifth Circuit denied both motions filed in their court by Milbank to supplement the record on appeal and for judicial noticed after the Solomons' written objections filed with the both Courts. See APPENDIX B & C. And, there were no specific orders by the Court for the claims in question in the Solomons' Complaint.

4. **Whether a bankruptcy court can substantially depart from its Scheduling Order to the prejudice of a party? If not, was this a violation of the Solomons' due process rights?**

The Fifth Circuit and the lower courts have entered its decision in this case that has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. This is a Due Process of Law question which is covered in the Federal Rules of Civil Procedure - FRCP 16. Pretrial Conferences; Scheduling; Management. A fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. It is found in the in the Fifth and Fourteenth Amendments to the U.S. Constitution which prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property.

In order to encourage careful pretrial management, FRCP 16(b) requires that a pretrial scheduling order be issued establishing timetables by which the case should proceed. The purpose of the scheduling conference and

order is to set deadlines for completing the principal pretrial steps, motions, and order. Hoffman - LaRoache, Inc. V. Sterling, 493 U.S. 165, 173, 110 S.Ct 482, 487 (1989).

The Solomon were never given an opportunity to complete their discovery and be heard pursuant to the Scheduling Order (Appendix D) to gather sufficient evidence to support their claims, non-responsive answers to claims by Milbank and general, and ex parte orders that are not a part of the record on appeal (and not presented or heard at the summary judgment hearing). The summary judgment hearing was held on December 3, 1997 over the Solomons' vigorous oral and written objections along with their affidavits. While the Scheduling Order stated that" Discovery must be completed by March 31, 1998 and Summary judgment motions may not be filed until April 1, 1998 but must be filed no later than April 30, 199." The bankruptcy court stated that he was just taking all parties comments under advisement. And, the Judge never change the discovery deadline nor took judicial notice of any facts. Then, the Solomon's were taken surprised when the Judge issued an Order for Summary Judgment for Milbank on March 3, 1998. The This Solomon never consented to a modification of the Scheduling Order and the Judge never stated that he was modifying the Scheduling Order for the Solomon's to object at the hearing. And, Milbank did not produced any summary judgment evidence and none is in the record on appeal. When the record is devoid of any summary judgment evidence, the issues could not properly have been determined on summary judgment. This was a violation of the Solomons' constitutional due process rights and the Solomon's were surely prejudiced by the Court acts.

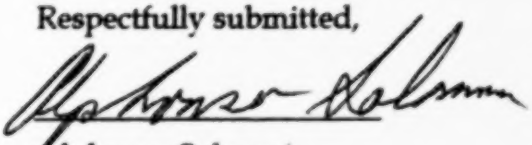
Pretrial orders play a crucial role in implementing the purposes of the Federal Rules of Civil Procedures "to secure the just, speedy, and inexpensive determination of every action." FRCP 1. Unless pretrial orders are honored and enforced, the objectives of the pretrial conferences to simplify issues and avoid unnecessary proof by obtaining admissions of fact will be jeopardized if not entirely

nullified. Accordingly, a party need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms. Disregard of these principles would bring back the days of trial by ambush and discourage timely preparation by the parties for trial. U.S. v. First National Bank of Circle, 652 F.2d 882 (9th Cir. 1981).

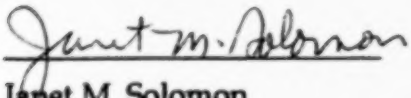
X. CONCLUSION

For the forgoing reasons, Alphonso Solomon and Janet M. Solomon, Petitioners, pray that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Alphonso Solomon



Janet M. Solomon

(Petitioners Pro Se)
213 Sandy Creek Place
DeSoto, Texas 75115-5354

Date: November 27, 2000

APPENDIX

INDEX TO APPENDICES

APP. A - Decision of the United States Court of Appeals - Fifth Circuit..... 1

APP. B - Order of the United States Court of Appeals - Fifth Circuit..... 3

APP. C - Decision of the United States District Court Northern District of Texas (Dallas).... 5

APP. D - Decision of the United States Bankruptcy Court Northern District of Texas (Dallas)..... 17

APP. E - Scheduling Order of the United States Bankruptcy Court Northern District Texas (Dallas) 27

APP. F - Decision of the United States Dallas District Court Northern District of Texas (Dallas)..... 31

APP. H - Decision of the United States Bankruptcy Court Northern District of Texas (Dallas)..... 38

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11174
Summary Calendar

In The Matter Of:
ALPHONSO SOLOMON,
Debtor.

ALPHONSO SOLOMON; JANET M. SOLOMON,
Appellants,
V.
ROBERT MILBANK, JR.,
Appellee.

Appeal from the United States District Court for the
Northern District of Texas - - Dallas Division
No. 3:98-CV-1033-P

June 28, 2000, Filed

Before SMITH, BARKSDALE and PARKER, Circuit Judges.

PER CURIAM: [1]

---

[1] Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Appellants, Chapter 7 debtors, appeal the district court's affirmance of the bankruptcy court's grant of summary judgment in favor of appellee Robert Milbank, Jr., the Solomons' Chapter 7 trustee. Appellants, unsatisfied with the performance of their trustee, brought suit against him asserting 19 causes of action sounding negligence, gross negligence and breach of fiduciary duty. Appellants sought recovery in the amount of $2 million.

On appeal before the district court, Appellants, asserted 24 points of error, generally arguing that the bankruptcy court erred (1) by denying them the opportunity to conduct discovery, (2) by failing to strike Appellee's motion for summary judgment, (3) by finding that Appellee had satisfied his burden on numerous aspects of the motion, (4) and by making improper factual determinations.

Before us, Appellants put forth eight points of error, all issues that received thorough consideration by the bankruptcy and district courts. Upon due consideration of the submissions of the parties and augmented record, we find no reversible error. Accordingly, we AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11174

In the Matter of: ALPHONSO SOLOMON
Debtor

ALPHONSO SOLOMON; JANET M. SOLOMON
Appellants

v.

ROBERT MILBANK, JR.
Appellee

Appeal from the United States District Court for the
Northern District of Texas, Dallas

June 7, 2000, Filed

ORDER:

IT IS ORDERED that the motion of appellee for judicial notice is DENIED.

IT IS FURTHER ORDERED that the alternative motion of the appellee to supplement the record on appeal is DENIED.

IT IS FURTHER ORDERED that the motion of appellant's to strike the statement of facts in section "A" in brief of appellee is DENIED.

IT IS FURTHER ORDERED that the motion of appellants' for leave to file amended response to appellee's motions for judicial notice and supplement the record is DENIED.

"s/_____"

Robert M. Parker

UNITED STATES CIRCUIT JUDGE

APP. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALPHONSO SOLOMON and	)	
JANET SOLOMON,	)	
Appellants,	)	
	)	Civil Action No.
V.	)	
	)	3:98-CV-1033-P
ROBERT MILBANK, JR. Trustee	)	
Appellee.	)	

September 14, 1999, Filed

MEMORANDUM OPINION AND ORDER

Now before the Court is Appellant's Appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, and Appellee's Motion to Amend the Record on Appeal. Appellants, appearing pro se, filed their brief on May 15, 1998, Appellee filed his brief on May 28, 1998, and Appellants filed a Reply Brief on June 8, 1998. Appellants seek reversal of a March 3, 1998 Bankruptcy Court order granting appellee's motion for summary judgment and dismissing each of Appellants' nineteen causes of action against appellee, which sound in negligence, gross negligence and breach of fiduciary duty and sought recovery of two million dollars in damages.

For the reasons set forth below, this Court AFFIRMS the opinion of the Bankruptcy Court and DENIES Appellee's Motion to Amend the Record on Appeal.

BACKGROUND

This is an appeal from the bankruptcy proceeding before the Hon. Judge Steven A. Felsenthal. Mr. Alphonso Solomon (the "Debtor," who, together with Ms. Janet Solomon, his non-debtor wife, are referred to as the "Solomons") filed a voluntary petition for relief under Chapter 11, on May 20, 1994. Appellee Robert Milbank, Jr. ("Milbank" or the "Trustee") was appointed as trustee of the Debtor's estate. The Debtor's case was converted to a Chapter 7 proceeding after a series of developments immaterial to this appeal, with Milbank continuing to serve as the bankruptcy estate's trustee. Although those events relevant to consideration of the Solomons' appeal are discussed more fully below, suffice to say that the record reflects what appears to be the Solomons' constant dissatisfaction with Milbank's performance as trustee throughout the bankruptcy process.

On April 16, 1996, with the Debtor's Chapter 7 case still pending before the Bankruptcy Court, the Solomons filed a lawsuit against Milbank and his attorneys in Texas state court. On April 29, 1996, Milbank and his attorneys sought, and soon after obtained removal of the case to the Bankruptcy Court. In May 1996, Milbank and his attorneys each filed motions to dismiss the Solomons' lawsuit, or , in the alternative, motions for summary judgment. The Bankruptcy Court granted those motions on July 16, 1996, dismissing the Solomons' claims against Milbank and his attorneys. The Solomons then appeal both orders to the District Court.

On March 5, 1997, U.S. District Court Judge Fitzwater affirmed the Bankruptcy Court's dismissal of the claims against Milbank's attorney, but remanded to the Bankruptcy Court a portion of the dismissal as to Milbank himself. Thereafter, the Bankruptcy Court directed the parties in June 1997 to address - and to bring their pleading

into conformity with - those issues identified by the District Court's remand. In accordance with this instruction, Milbank filed his second amended motion to dismiss or for summary judgment on October 8, 1997. After hearing argument on Milbank's motion on December 3, 1997, the Bankruptcy Court granted the motion for summary judgment on March 3, 1998 and dismissed all of the Solomons claims against Milbank. It is from this March 3, 1998 order (the "March 3 Order") that the Solomons now appeal asserting that the Bankruptcy Court erred, among other ways, by denying them the opportunity to conduct discovery, by failing to strike the Milbank's motion for summary judgment, by finding that Milbank had satisfied his burden on numerous aspects of he motion, and by making fact determinations more appropriately made by a jury. Because the Solomons proffer twenty-four often-interrelated Points of Error on appeal, similar arguments are grouped together where appropriate for purposes of this analysis.

DISCUSSION

I. STANDARD OR REVIEW

This Court's review of a bankruptcy count's findings of fact is subject to the clearly erroneous standard. Matter of Young, 995 F.2d547, 548 (5th Cir. 1993); Matter of Allison, 960 F.2d481, 483 (5th Cir. 1992). These findings are reversed only if, based on the entire evidence, this Court is left "with the definite and firm conviction that a mistake has been made." Id. While conducting this review, this Court is particularly mindful of the opportunity for the bankruptcy judge to determine the credibility of the witness. Matter of Young, 995 F.2d at 548 (citing Bankruptcy Rule 8013). Conclusions of law are reviewed de novo. Id.

II. TIMING OF THE SUMMARY JUDGMENT MOTION

[Points of Error 1, 2 and 3]

The Solomons' 1st, 2nd and 3rd points of error argue that the Bankruptcy Court abused its discretion by entertaining Milbank's motion to dismiss or for summary judgment ("Milbank's motion") in violation of the court's September 29, 1997 scheduling order (the "September 29 Order"). Among other things, the September 29 Order provided that motions for summary judgment would not be filed until April 1998, whereas Milbank filed his motion on October 8, 1997. Making much of Milbank's "failure" to seek leave to amend the September 29 Order's schedule (see Appellant's brief at 17, 19), the Solomons argue that the Bankruptcy Court should not have considered the motion (1st point of error), that the motion should have been stricken (2nd point of error), and that they were denied adequate discovery (3rd point of error).

The record reveals, however, that neither party had received, or was aware of , the schedule set out in the September 29 Order until a December 3, 1997 hearing conducted by Judge Felsenthal. This Court's review of the December 3 transcript shows that, upon learning that the parties were unaware of the September 29 Order's schedule, Judge Felsenthal amended the schedule in open court with the full participation and approval of both Milbank and the Solomons. (See Transcr. 12/3/97 at pp. 26-28). As trial judge, of course, Judge Felsenthal was well within his authority to regulate the timing of the motion practice (see Bankruptcy Rule 7016, referencing Fed. Rule Civ. Proc. 16(b)) and, particularly in light of the Solomons failure to object to the new schedule at the hearing, this Court can find no abuse of discretion.

In addition, the Solomons cannot now complain about their lack of time t conduct discovery.[1] As an initial matter, the claims that form the basis of their appeal only related to Milbank's conduct as trustee, a narrow issue necessitating but limited discovery. Furthermore, the issues raised in

October 1997 by Milbank's motion for summary judgment could not have taken the Solomons by surprise, as the issues were substantively identical to those raised by Milbank in his original answer and motion to dismiss, filed one and one-half years earlier, in May 1996. Finally, by their own admission, the Solomons did not begin to seek discovery until February 27, 1998 (see Appellant's brief at 21), some two years after filing their lawsuit, five months after the initial scheduling on September 29, and nearly three months after Judge Felsenthal established in open court a new schedule for proceeding with Milbank's motion.

Under these circumstances, the Solomons were afforded a reasonable time to conduct discovery, only their own delay was unreasonable.[1] Therefore, as these threshold issues raised by the Solomons are betrayed by the record, this Court finds no error.

III. THE COURT DID NOT PREEMPT ANY JURY FUNCTION [Point of Error 4]

In their 4th point of error, the Solomons argue that by granting Milbank's motion, the Bankruptcy Court decided issues that should have gone to a jury. As will be made clear by this Opinion's analysis of each specific point of error, this Court concludes that the bankruptcy Court acted entirely within its purview and in no way usurped any function more properly belonging to a jury. Because no such abuse of discretion was found, the Bankruptcy Court's dismissal of the 4th point of error is affirmed.

---

[1] The Court notes that the Solomons complaints regarding discovery are wholly conclusory, and never specify what discovery they were prevented from conducting during the Bankruptcy Court Proceedings.

IV. DEBTOR'S STANDING [Point of Error 5]

In March 3 Order, the Bankruptcy Court expressed, for hypothetical purposes, its view that the Debtor would need to show a certain threshold amount of damages in the event he was entitled to recovery on any cause of action. (March 3 Order at 3). The Solomons' 5th point of error quarrels with this amount, asserting that the figure was improperly derived.

This Court begins its review by noting that the Solomons' argument includes a number of new theories not properly developed below. (Compare Appellant's brief at 23 with Plaintiff's Response to Trustee's Second Amended Motion to Dismiss, or, in the Alternative, for Summary Judgment at 9-11). New summary judgment evidence cannot be properly offered on appeal. Topalian v. Ehrman, 954F.2d 1124, 1131-32, n. 10 (5th Cir.), cert. denied, 113 S. Ct. 82 (1992). However, regardless of whether or not the issue was properly raised or briefed below, it is clear that the Bankruptcy Court's hypothetical was merely dicta which in no way determined either the analysis or the outcome of the March 3 Order. Therefore, because this court can find no abuse of discretion, dismissal of the 5th point of error affirmed.

V. THE CAMP WISDOM PROPERTY [Points of Error 6, 7, 9, 11 and 15]

The Solomons' 6th , 7th, 8th, 9th, 11th and 15th points of error (which relate to the dismissal of their first, second fourth, sixth and tenth causes of action) involve Milbank's conduct during the valuation and aborted sale, of, and/or the lien or note payment on , a 156-acre tract belonging to the Debtor's estate known as the "Camp Wisdom Property." The Solomon's first and second causes of action essentially argued that Milbank, while acting as Trustee, negligently

failed to close on the sale of the Camp Wisdom Property to Metroport Partners, a developer interested in building on the property what was to become the NASCAR Texas Motor Speedway. It is uncontested that soon after entering into a sales contract with the Trustee, Metroport unilaterally terminated the sales contract. (Appellants' brief at 11, 26; Appellee's brief at 9).

Upon Metroport's breach, Milbank brought against Metroport's breached the contract because it decided to build the Speedway near Forth Worth instead of Dallas, Milbank was awarded the deposit, fees and costs. (See Judge Felsenthal's May 13, 1996 Order in Adv. Proc. 395-3375; March 3 Order at 4). Thus, because the Bankruptcy Court had already determined that Metroport, not Milbank, was responsible as a matter of law for the sale's failure, Judge Felsenthal appropriately dismissed the Solomons first and second causes of action against Milbank. (March 3 Order at 4).

The Solomons' fourth cause of action, alleging negligence and collusion by Milbank in retaining an appraiser for the Camp Wisdom Property, was also dismissed by the Bankruptcy Court. (March 3 Order at 5-6). In doing so, Judge Felsenthal observed that the appraiser's retention was considered by the court and approved by court order. (Id. at 5). In addition to applicable doctrines of collateral estoppel and res judicata, a trustee under these circumstances is immunized under the doctrine of Derived Judicial Immunity. As Milbank correctly points out, a trustee's conduct is afforded absolute immunity where that conduct has been approved by a bankruptcy court. Boullion v. MClanahan, 639 F.2d 213,214 (5th Cir. 1981); see also Davis v. Bayless, 70 F. 3d 367, 373-75 (5th Cir. 1995). In addition to this basis for dismissal, Judge Felsenthal also considered the Solomons' submission, and properly

concluded that no evidence of collusion existed. (March 3 Order at 5-6).

For similar reasons, the Bankruptcy Court appropriately dismissed the Solomons sixth cause of action pertaining to Milbank's negligence in not accepting a note from the lienholder of the Camp Wisdom Property. Indeed, this Court finds ample evidence of Bankruptcy Court orders involving Milbank's work on the Camp Wisdom Property to justify the dismissal of this claim. *Boullion v. McClanaham*, 639 F.2d at 213 (*See, e.g.*, Orders dated (2/9/96, 11/6/97, cited at Appellee's brief at 32). The existence of such a record convinces this Court that no abuse of discretion took place when Milbank was granted summary judgment on the Solomons' sixth cause of action.

Finally, the Bankruptcy Court did not err in dismissing the Solomons' tenth cause of action against Milbank, which alleged negligence for Milbank's failure to make a note payment on the Camp Wisdom Property. In dismissing this count, the Bankruptcy Court cited its own prior hearing and determination that the Camp Wisdom Property had no equity. (March 3 Order at 8). Instead of making a payment on a note for which there was no valuable property, Milbank opted to preserve the estate's limited assets. Given such a record, the Bankruptcy Court did not err by finding that Milbank acted reasonably and in the best interest of the estate's creditors.

Because this Court finds Judge Felsenthal's reasoning persuasive (and, in any even, not an abuse of discretion), dismissal of the 6th, 7th, 9th, 11th and 15th points of error is affirmed.

VI. THE GRAHAM BARBER COLLEGE STOCK

[Points of Error 8 and 10]

The Solomons' 8th and 10th points of error (which relate to the dismissal of their third and fifth causes of action), each involved Milbank's alleged negligence in the handling of the estate's stock in the Graham Barber College. These claims - and the Bankruptcy Court's handling of them - are similar to those concerning the Camp Wisdom Property. As set forth in the above Camp Wisdom analysis, this Court finds no error in the Bankruptcy Court's refusal to permit the Solomons to collaterally attack matters previously "blessed" by the court,[2] or to pierce the protections afforded Milbank by the Derived Judicial Immunity doctrine. Similarly, the Bankruptcy Court did not abuse it's discretion by surveying the evidence offered by the Solomons and finding nothing to warrant denial of Milbank's motion for summary judgment. Therefore, this Court affirms the dismissal of the 8th and 10th points of error.

VII. UNIQUE VI CORPORATION [Point of Error 12]

The Solomons 12th point of error (which relates to dismissal of their seventh cause of action) involves Milbank's alleged negligence in administering the estate's shares of Unique VI Corporation. More specifically, the Solomons alleged that Milbank failed to attend board meetings, to control the election of board members and to force the board to declare dividends. Construing the evidence in the light most favorable to the Solomons, the Bankruptcy Court determined that Milbank did in fact attend board meetings and persuade Unique VI board members to take certain actions beneficial to the estate. (March 3 Order at 6). These findings are consistent with the

---

[2] Although the determinative, this Court notes that the Bankruptcy Court's order approving the Graham Barber College stock settlement negotiated by Milbank (and now raised by the Solomons as indicative of Milbank's alleged negligence) was also affirmed by the District Court and the Fifth Circuit on appeal.

record, in fact, while Milbank's affidavit provides a clear basis for the court's determination, Mr. Solomon's affidavit merely makes conclusory accusations. (Compare Milbank Aff., 10/8/97 at PP 23-24 with Solomon Aff., 1/6/98 at PP9, 31-35). The Bankruptcy Court also fairly determined that Milbank had no control over Unique VI's ability to declare dividends. (March 3 Order at 6).

In making an independent review the record, this Court can find no error or abuse of discretion on the part of the Bankruptcy Court in dismissing the Solomons seventh cause of action on Milbank.

VIII. SETTLEMENT OF THE CITY OF DALLAS LITIGATION [Point of Error 13]

The Solomons' 13th point of error (relating to dismissal of their eight cause of action) involves the allegation that Milbank was negligent in failing to pursue litigation or settlement with the City of Dallas. The Bankruptcy Court found that it was Mr. Solomon who was responsible for failing to settle the Dallas litigation, rather than Mr. Milbank, as the Solomons continue to argue. Finding only the Solomons' unsupported conclusions in the record, this Court detects no abuse of discretion.

IX. LOSSES BY THE SOLOMONS' OTHER BUSINESSES [Points of Error 14]

In a rehashing of arguments already addressed, the Solomons' 14th point of error (which relates to dismissal oftheir ninth cause of action), asserts that two of their other companies suffered certain losses as a result of Milbank's general negligence. Finding that its previous orders approving the complained-of actions provide Milbank with derived judicial immunity,[3] the Bankruptcy Court

[3] See Camp Wisdom Property and Graham Barber College Stock sections for discussions of these orders.

appropriately dismissed the ninth cause of action. (March 3 Order at 7). As made clear by this Court's prior discussion regarding the Camp Wisdom Property and the Graham Barber College Stock, the Bankruptcy Court's decision is without reversible error.

X. MILBANK'S FEES AND MS. SOLOMONS RIGHTS

[Points of Error 16, 17, 18, and 19]

The Solomons' 16th, 17th, 18th and 19th points of error (relating to dismissal of their eleventh, twelfth, thirteenth and fourteenth causes of action) make various arguments regarding the Milbank's alleged wrongful administration of the estate's assets. More specifically, the 16th point or error alleges that Milbank paid himself at Ms. Solomon's expense. However, as noted by Judge Felsenthal and supported by the record, Milbank was paid only pursuant to Bankruptcy Court order. (March 3 Order at 9). Moreover, because administrative fees are afforded statutory priority, Milbank was entitled to a priority on his fees for services rendered as Trustee. See 11 U.S.C. SS 330, 503, 507.

In their 17th point of error, the Solomons' argue that Ms. Solomon was entitled to adequate protection payments. The Bankruptcy Court found that even if Ms. Solomon had an adequate claim and thereby was a creditor of the estate, she could not have been entitle to such payments pursuant to 11 U.S.C. S36a. (*See* March 3 Order at 9; 11 U.S. C. S361). Similarly, the Solomons' 18th point of error protests Milbank's failure to extend Ms. Solomon a "right of first refusal" on the sale of the estate assets. The Bankruptcy Court decided that Ms. Solomon waived any claims by failing to bid or otherwise appear in court for any asset sale, despite the fact that all sales were pursuant to court order after notice and hearing. (March 3 Order at 9).

The Solomons complain in their 19th point of error that Milbank's negligence caused unnecessary

administrative fees and costs. As an initial matter, and as discussed throughout this Opinion, this Court agrees with the Bankruptcy Court's numerous conclusions that Milbank was not negligent in performing his duties as Trustee. Furthermore, because the record shows that the Bankruptcy Court already approved Milbank's fee applications, this Court agrees with Judge Felsenthal that the 19th point of error represents improper collateral attach upon these prior approvals (March 3 Order at 10).

Accordingly, with respect to the Solomons' 16th, 17th, 18th and 19th pons of error, this Court is persuaded by the Bankruptcy Court's analysis and conclusions and, in any event, discerns no abuse of discretion.

XI. MISC. [Points of Error 20, 21, 22, 23 and 24]

This Court has reviewed the Solomons 20th, 21st, 22nd, 23rd and 24th points of error (pertaining to causes of action fifteen through nineteen), and finds them to be mere ressertions of arguments already considered and disposed of. Therefore, this Court finds no abuse of discretion in the Bankruptcy Court's dismissal of them.

CONCLUSION

Having thoroughly reviewed the appellate record, the arguments of the parties, and the relevant law, the Court is of the opinion that the March 3 Order of Bankruptcy Court granting Milbank's motion of summary judgment is without reversible error and is therefore AFFIRMED.

Furthermore, because the Court is able to affirm the Bankruptcy Court without additional documents, Milbank's Motion to Amend the Record on Appeal is DENIED.

So Ordered

Signed this 13th day of September, 1999

"s/_____"

JORGE A. SOLIS - U.S.DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	
ALPHONSO SOLOMON,	)	CASE NO. 394-33093-SAF7
DEBTOR.	)	
_____	)	
ALPHONSO SOLOMON	)	
AND JANET SOLOMON,	)	
PLAINTIFFS,	)	
	)	
VS.	)	ADVERSARY NO. 396-3173
	)	
ROBERT MILBANK, JR.	)	
DEFENDANT.	)	

March 3, 1998, Filed

ORDER

On April 19, 1996, the debtor, Alphonso Solomon, and his non-debtor wife Janet Solomon, filed a lawsuit against Robert Milbank, Jr., the trustee and William Chris Wolffarth and Jenna V. Unell, the trustee's attorneys, in the 28th Judicial District Court, Dallas, County, Texas, asserting causes of action of negligence, gross negligence and breach of fiduciary duty in connection with the trustee's administration of the debtor's bankruptcy estate and seeking damages of $2 million. On April 29, 1996, the defendants removed the case to the United States Bankruptcy Court for

the Northern District of Texas. The defendants then filed motions to dismiss, or alternatively or summary judgment, which motions were granted on July 16, 1996. The plaintiffs appealed that ruling to the United States District Court. On March 5, 1997, the district court entered its decision affirming judgment in favor of the trustee's attorneys, and affirming in part and vacating and remanding in part the dismissal of plaintiffs' action against. On June 19, 1997, this court directed the plaintiffs and the trustee to address certain specific issues in order to bring their pleadings in conformity with the district court decision. On October 8, 1997, the trustee filed his second amended motion to dismiss, or, in the alternative, for summary judgment, and his brief in support. The court held a hearing on the motion on December 3, 1997.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a mater of law. Celotex v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed act is determinative under governing law. Anderson, 477 U.S. At 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. At 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set

forth specific facts showing that there is a genuine issue for trial. Matsushita v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The real life problems behind this adversary are (1) the fact that the new racetrack (Texas Motor Speedway) was built north of Forth Worth and not in south Dallas on or near property on Camp Wisdom Road which the debtor owned, (2) a contract dispute with the City of Dallas, and (3) the debtor's improper conduct in connection with the finances of Graham Barber College.

As a general matter the trustee is entitled to immunity for conduct which the court has approved. Also, res judicata and collateral estoppel generally apply when a party has already been heard on a issue such as a regularly happened here at fee applications and other hearings. The court will nonetheless individually address each cause o action asserted by the plaintiffs Alphonso and Jane Solomon.

The court notes that even if the debtor could recover on a cause of action, for the debtor to receive a dividend he would need to show a recovery of at least $200,000. If the recovery was less than $200,000 the full recovery would go to unpaid priority and unsecured creditors of the bankruptcy estate with nothing going to debtor other than the satisfaction of paying his creditors more of what they are owed.

The plaintiffs' allege in count one that the trustee was negligent in closing the sale to the City of Dallas of approximately 54 acres of the Camp Wisdom property. The plaintiffs allege a number of acts by the trustee including failure to inspect deeds, titles and curing defects in titles and deeds. Allegedly, these problems hindered the sale of the remaining 156 acres of Camp Wisdom property. The sale of the 54 acres was to be for approximately $94,400. The sale to

the city closed. The potential buyer of the remaining 156 acres breached the purchase agreement. The trustee received a judgment against the potential purchaser based on that breach. As the buyer breached the purchase agreement any issue about the trustee/seller delaying the sale is moot. The court has signed several orders relating to the work done by the trustee regarding the Camp Wisdom property. The trustee did attempt to cure in a timely fashion. The court also erred an order abandoning the unsold 156 acres of Camp Wisdom property to the debtor. The debtor had the opportunity to receive his property in basically the same condition as when it entered the bankruptcy estate. The trustee is entitled to summary judgment on count one.

The plaintiffs' allege in count two that the defendant was negligent for not closing the sale of approximately 156 acres of Camp Wisdom property. The plaintiffs allege several acts that the trustee might have done differently to expedite the sale but they are irrelevant. The court found that the potential buyer of the Camp Wisdom property breached the sales agreement. The court granted the trustee a judgment based on the buyers' breach. The decision by the developers to build the racetrack north of Forth Worth and not in South Dallas was the key reason the sale did not close. The conduct of the trustee did not prevent the sale from closing. The trustee is entitled to summary judgment on count two.

The plaintiffs' third cause of action asserts the trustee was negligent for not selling the estate's stock in Graham Barber College for $700,000 to Larry Johnson. One of the conditions of Johnson's offer was to have Graham Barber College put into a receivership. The college was not in a receivership. Johnson also required that all litigation between the debtor and the Lafrance Graham group be resolved. The criteria for the Johnson offer were not timely

satisfied. The trustee negotiated a settlement with Graham Barber College regarding allegations of fraud by the debtor. The plaintiffs were a party in interest with an option to be heard on the settlement. This court approved the settlement. The district court and the Fifth Circuit affirmed. The trustee disposed of the stock per the settlement. The plaintiffs may not collaterally attack the order approving the settlement. There is no evidence of negligence or collusion relating to the Graham Barber College stock. The trustee is entitled to summary judgment on count three.

The plaintiffs' fourth cause of action asserts the trustee was negligent in choosing an appraiser and colluded with the appraiser. The debtor objected to the trustee's proposed appraiser prior to this court authorizing the employment of any appraiser. The trustee is not obligated to hire an appraiser that pleases the debtor. The court considered the qualifications of the trustee's choice of appraiser. This court approved the appraiser pursuant to order dated December 15, 1995. There is no evidence of collusion between the appraiser and the trustee. Collateral estoppel bars this claim. The trustee in entitled to summary judgment on count four.

The plaintiffs' fifth cause of action asserts the trustee was negligent in managing the stock of Graham Barber College. There is no evidence of the value of the stock. The trustee reached a comprehensive settlement with the college which included disposal of the stock and the discharge of the debtor's non-dischargeable fraud-base debt. The court found the settlement reasonable, fair and equitable. Collateral attack on the settlement is not allowed. The trustee is entitled to summary judgment on count five.

The plaintiffs' sixth cause of action asserts the trustee was negligent in his failure to capitalize on the noteholder's offer for the Camp Wisdom property. At the time of the offer, the trustee reasonably believed he could realize more

from the property. Solomon continuously urged throughout the case that the trustee could get more for the land. The trustee is entitled to summary judgment on count six.

The plaintiffs' seventh cause of action asserts the trustee was negligent in administering the estate's interest in shares of Unique VI Corporation. The plaintiffs assert the trustee failed to attend board meetings, use control to elect board members, force the board to declare dividends and to provide "due diligence" information to Janet Solomon. The trustee did attend board meetings and persuaded board members to take actions beneficial to the estate. Dividends were not declared because of the loss of rental income from ASC (Alphonso Solomon and Company, which was controlled by the plaintiffs), the need to perform deferred maintenance on the property and the cost of litigation connected with Unique VI. Construing the summary judgment evidence in he light most favorable to the plaintiffs, there is no evidence of negligence. The trustee is entitled to summary judgment on count seven.

The plaintiffs allege in count eight that the defendants failed to pursue the litigation with the City of Dallas to arrive at an adequate settlement. The debtor and his state court counsel agreed to settle this suit for $4,900 but failed to finalize the agreement. The trustee offered to abandon the suit to the debtor. The trustee is entitled to summary judgment on count eight.

The plaintiffs allege in count nine that certain undefined actions by the trustee damaged ASC and Sunbeam Environmental Services, Inc. The plaintiffs also alleged they spent time away from their businesses handling litigation and bankruptcy problems. The plaintiffs also allege a loss of cash flow from the Camp Wisdom land sale that did not close and that the handling of the Graham Barber College stock hindered their other businesses. The court orders and judgment referenced above and the court's

approval of the trustee's fee application preclude a finding of negligence in regard to the Camp Wisdom property and the stock of Graham Barber College. The debtor spent a good deal of time appealing decisions of this court to this District Court and Fifth Circuit before the Circuit denied the various appeals on September 25 1997. A debtor cannot complain that he was distracted by court proceedings when he voluntarily enters the court system and then voluntarily avails himself of the appellate process. The trustee did receive a judgment against the potential purchaser for not buying the Camp Wisdom property. The fact that the racetrack developers ultimately chose to build the new racetrack north of Forth Worth and not in Dallas cannot be related to the conduct of the trustee. The trustee is entitled to summary judgment on count nine.

The plaintiffs' tenth cause of action asserts the trustee was negligent for not paying the October 1, 1996, payment on the Camp Wisdom property. During a September 26, 1996, hearing, the court determined there was no equity in the Camp Wisdom property. On October 11, 1996, the stay was modified to allow the lien holder to foreclose on its security interest. On October 23, 1996, the trustee filed his notice of intent to abandon the property. On November 6, 1996, the Camp Wisdom property was abandoned to the debtor. The property was foreclosed on January 7, 1997. The trustee has a fiduciary duty to creditors of the estate. With a motion to lift the stay to permit a foreclosure on the deed of trust on the Camp Wisdom property pending and the prospect the court would find that the estate no longer had equity in the property, the trustee determined he should no longer make note payments on the land. Rather, he determined to preserve the estate's limited resources for the unsecured creditors. It is not negligent to protect creditors buy not making payments when there is no equity in a piece of property. The property was abandoned to the debtor. If the property was worth what the plaintiffs assert (and not

the lower value the court found), then the plaintiffs should have been able to refinance the property. The trustee is entitled to summary judgment on count ten.

The plaintiffs' eleventh cause of action asserts that the trustee wrongfully paid "himself" out of Janet's share of the proceeds from the sale of all assets." First, trustees are entitled to a priority administrative expense claim for their services. The funds for the administrative expenses can come from process of sales of estate assets. Second, at all points in this bankruptcy case the trustee was only compensated pursuant to court order. Third, Janet Solomon's claim is at best in the unsecured creditor class. The trustee is entitled to summary judgment on count eleven.

The plaintiffs' twelfth cause of action asserts that the trustee did not provide adequate protection payments for Janet Solomon's share of the assets. All assets. All assets involved in this case are property of the bankruptcy estate. Even if Janet Solomon has a claim, thereby making her a creditor, she would not be the type of creditor entitled to adequate protection payments. 11 U.S.C $361. The trustee is entitle to summary judgment on count twelve.

The Plaintiffs' thirteenth cause of action asserts that the defendant failed to offer Janet Solomon the right of first refusal on the sale of all assets. The right of the first refusal is not a community property right in this situation. Even if Janet Solomon did have a right of first refusal (based on some right granted in a plan or otherwise), all sales were pursuant to court order after notice and hearing. Janet Solomon had the right to appear and provide a better offer. She did not do so. Thus, even if Janet Solomon at one time had an issue regarding the sale of assets, there is no longer a valid cause of action relating to an offer of first refusal. The trustee is entitled to summary judgment on count thirteen.

The plaintiffs assert as their fourteenth cause of action a general complaint that the defendant's negligence caused unnecessary trustee fees, attorney fees and costs. The court approved the trustee's compensation as an administrative expense. The court approved professional feeds as an administrative expense. The plaintiffs cannot now collaterally attack the court's approval of fees. This is not a valid cause of action. The trustee is entitled to summary judgment on count fourteen.

The plaintiffs in their fifteenth count assert lost earnings, late charges and hardship and mental anguish on the their children. Any recovery for lost earnings and late charges would have to be tied to specific cause of action where such recovery is appropriate. Nothing in count fifteen would entitle the plaintiffs to lost earnings and late charges would have to be titled to a specific cause of action where such recovery is appropriate. Nothing in count fifteen would entitle the plaintiffs to lost earnings or late charges. As to their children, the Bankruptcy Code does not provide for hardship or mental anguish even if the Solomon's children did in fact suffer. The court notes that this whole situation began when Alphonso Solomon filed his voluntary petition for relief under the Bankruptcy Code. Then his Chapter 11 plan of reorganization was confirmed. But because Solomon did not make a required plan payment, the plan failed. Neverrtheless, Solomon obtained a discharge. Because of the trustee's efforts, the discharge included otherwise non-dischargeable debts. No party in interest has sought to revoke that broad discharge even though Solomon's plan failed. The liquidation of assets under Chapter 7 is the natural result of voluntarily filing a bankruptcy case and then having the debtor's Chapter 11 plan fail. The trustee is entitled to summary judgment on count fifteen.

The plaintiffs assert in count sixteen that the

defendant failed to obtain and provide for an adequate bond to cover losses to the assets. There has been no call on the bond making this cause of action premature. Regardless of ripeness, the claims of the Solomon's are not covered by the trustee's bond in this case. Thus, the amount of the bond is immaterial. The trustee is entitled to summary judgment on count sixteen.

The plaintiffs generally restate their complaint in their seventeenth cause of action. This is simply a summary and restatement with no new allegations. There is not a valid cause of action within count seventeen. The trustee is entitled to summary judgment on count seventeen.

The plaintiffs claim pre-judgment interest as a cause of action in count eighteen. Since he trustee is entitled to a summary judgment dismissing the plaintiffs' claims, the plaintiffs are not entitled to pre-judgment interest. The trustee is entitled to summary judgment on count eighteen.

The plaintiffs claim reimbursement for their time and expense, court costs and attorneys feeds as a course of actions in count nineteen. Since the trustee is entitled to a summary judgment dismissing the plaintiffs are not entitled to a recovery of costs or reimbursement of their time and expense. The trustee is entitled to summary judgment on count nineteen.

Base on the foregoing,

IT IS ORDERED that the motion for summary judgment of the trustee Robert Milbank, Jr, is GRANTED and the plaintiffs Alphonso and Janet Solomon's complaint is DISMISSED with prejudice.

Signed this 2nd day of March 1998.

"s/_____"

Steven A. Felsenthal

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	
	)	CASE NO. 394-33093-SAF-7
ALPHONSO SOLOMON)		
DEBTOR.	)	
_____	)	
	)	
ALPHONSO SOLOMON	)	
AND JANET SOLOMON)		
	)	
PLAINTIFFS,	)	
	)	
VS.	)	ADVERSARY NO. 396-3173
	)	
ROBERT MILBANK, JR.	)	
DEFENDANT.	)	

September 29, 1997, Filed

SCHEDULING ORDER

The court conducted a scheduling conference on September 12, 1997. The plaintiffs, Alphonso Solomon and Janet Solomon, appeared pro se. The defendant, Robert Milbank, Jr., appeared pro se. Based on the scheduling conference.

IT IS ORDERED:

1. The trail docket call shall be June 8, 1998, at 1:30 p.m., with the trial to be conduced during the week of June 15, 1998. Parties shall be prepared for trial by the trial docket call. Counsel shall appear at the trial docket call. The parties and their witnesses shall not appear. At the trial docket call, the court will establish the order of trials for the trial week set by this order or thereafter.

2. Discovery must be completed by March 31, 1998.

3. An answer with any affirmative defenses and counterclaims shall be served and filed by October 14, 1997.

4. The court shall conduct a hearing on the pending motion to dismiss on December 1, 1997, at 9:30 a.m. The court shall conduct a status conference on the plaintiff's jury trial request on December 1, 1997, at 9:30 a.m.

5. Summary judgment motions may not be filed until April 30, 1998.

6. A pretrial order in compliance with Local District Court Rule 16.4 shall be served and filed five calendar days prior to trial docket call. All counsel are responsible for preparing the pretrial order, which shall contain the following:

(1) a summary of the claims an defenses of each party

(2) a statement of stipulated facts;

(3) a list of contested issues of fact;

(4) a list of contested issues of law;

(5) an estimate of the length of trial;

(6) a list of additional matters which would aid in the disposition of the case:

(7) the signature of each attorney; and

(8) a place for the date and signature of the Court.

In addition, the court requires a status statement of any settlement discussions.

The pretrial order shall govern the conduct of the trial.

7. Five calendar days prior to trial docket call, all exhibits, except impeachment documents, shall be exchanged with an opposing counsel. Two copies of an exhibit list shall be provided to the court at docket call. Also, five calendar days prior to trial docket call, a list of witnesses shall be exchanged and filed.

Prior to trial docket call, all exhibits shall be marked by counsel using exhibit labels furnished by the clerk. The labels must indicate whose exhibit it is and the trial date. In addition, the labels shall be marked as follows.

Plaintiff - numerically, beginning No. 1

Defendant - Alphabetically, e.g. A,B, C ...

AA, AB, AC ...BA, BB, BC...

In case with more than one plaintiff or defendant, identify the appropriate party on each exhibit. Counsel should stipulate to the admissibility of as , many proposed exhibits as possible. If no written objection to a proposed exhibit to served and filed prior to or at docket call, the exhibit will be admitted except for relevancy objections.

8. Proposed findings of fact and conclusions of law shall be served and filed five calendar days prior to trial docket call. Pretrial briefs must be served and filed five calendar days prior to trial. The court encourages parties to file a trial brief , the contents to vary with the complexity of the case.

9. During the entire pendency of this action, through and including the end of trial, the parties shall vigorously pursue the possibility of settlement.

10. At docket call, all parties and their counsel must certify to full compliance with this order. The court will consider the imposition of appropriate sanctions in the event of noncompliance.

11. Amendments of this order, including requests for continuances, may be obtained for cause shown by written motion. The motion must contain a statement of reasons for the amendment and shall be served on opposing counsel, who may file a response to the motion within seven days of service. Failure of opposing counsel to file a response shall constitute consent to the requested relief. The court will rule on the motion based on the written filings without a hearing.

12. This order supersedes previous scheduling orders.

DATED this 24th day of September, 1997.

"s/_____"

Steven A. Felsenthal,

United States Bankruptcy Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE ALPHONSO SOLOMON,	)	
Debtor,	)	
	)	
ALPHONSO SOLOMON, et al.,	)	Civil Action No.
	)	3:96-CV-2579-D
Plaintiffs-	)	(Bank, Ct. No. 94-
Appellants,	)	33093-SAF-7;
	)	Adv. No. 396-3173)
VS.	)	
ROBERT MILBANK, JR. Et. al,	)	
Defendants-	)	
Appellees.	)	

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
March 5, 1997, Filed

FITZWATER, District Judge:

Debtor-plaintiff-appellant Alphonso Solomon ("Alphonso") and his wife, plaintiff-appellant Janet M. Solomon ("Janet"), a purported creditor of Alphonso's estate, appeal the bankruptcy court's order granting summary judgment in favor of defendants-appellees Wm.

Chris Wolffarth, Esq. ("Wolffarth") and Jenna V. Unell Esq. ("Unell"), who were retained as trustee's counsel, and its order dismissing their claims against Robert Milbank, Jr., Esq. ("Milbank"), the bankruptcy trustee. For the reasons that follow, the court affirms the summary judgment in favor of Wolffarth and Unell and affirms in part and vacates and remands in part the dismissal of plaintiffs' action against Milbank.[1]

Alphonso and Janet, purporting to act individually and on behalf of Alphonso's bankruptcy estate, filed suit in state court against Milbank, Wolffarth, and Unell. They alleged various claims based on conduct that defendants had undertaken in their capacities as trustee and trustee's counsel. They contended that defendants were generally negligent in administering the estate, and that they had acted in collusion with others in breach of trust. Plaintiffs alleged that defendants were specifically negligent in connection with transactions involving the sale of land to the City of Dallas and to Metroport Development Partners, and with respect to plaintiffs' interests in Graham Barber College, Inc. and Unique VI Corporation. Defendants removed the suit to bankruptcy court, where it was docketed as adversary proceeding.

Milbank moved to dismiss plaintiffs' complaint on the basis of derived judicial immunity, contending his actions as trustee, which were approved by the bankruptcy court, conferred absolute immunity. He also contended that plaintiffs' claims were barred by res judicata and collateral estoppel. The bankruptcy court granted the motion to dismiss on the ground that plaintiffs lacked standing to

---

[1]Appellants' request for oral argument is denied See Fed. R. Bankr. P. 8012.

assert the claims they had pleaded against Milbank because the claims were all essentially creditor complaints - that there should have been sufficient assets in the estate to pay creditors in full. The bankruptcy court also rejected any of plaintiffs' claims based on actions taken by the trustee acting pursuant to court order.

Wolffarth and Unell moved to dismiss or for summary judgment, contending plaintiffs lacked standing to assert claims on behalf of Alphonso's bankruptcy estate, Wolffarth and Unell did not owe a legal duty to plaintiffs because they were not in privity with plaintiffs; Wolffarth and Unell were entitled to derivative quasi-judicial immunity as general counsel to the bankruptcy trustee; and Plaintiffs' claims were abased on actions that had received bankruptcy court approval and therefore were barred by res judicata, collateral estoppel, waiver, estoppel, or the compulsory counterclaim rule. The bankruptcy court granted Wolffarth and Unell's motion for summary judgment, holding that Alphonso did not have standing to bring a negligence or malpractice cause of action, both of which belonged to the estate and its creditors; that claims that belonged to the estate or an individual creditor must be filed with leave of court by creditors on behalf of the estate; and the plaintiffs lacked standing to bring individual claims because they were not in privity with Wolffarth and Unell, the trustee's counsel.

This appeal followed.

II.

The bankruptcy court correctly held that plaintiffs lacked standing to sue Wolffarth and Unell on behalf of the estate. If an action belongs to the estate, only the trustee has

standing to sue. In re Educators Group Health Trust, 25 F.3d 1281, 1284 (5th Cir. 1994) (citing In re E.F. Hutton Southwest Props, II. Ltd., 103 B.R. 808, 812 (Bankr N.D. Tex. 1989)). A claim for a direct injury to estate belongs to the bankruptcy estate. Id. At 1285.

The bankruptcy court also properly ruled that Wolffarth and Unell owed no duty to plaintiffs individually. They were retained with court approval to represent the trustee and the bankruptcy estate. They had no attorney-client relationship with plaintiffs. Because their duties were to the trustee and estate, they cannot be held liable as a mater of law for the conduct of which plaintiffs complain. See Wade v. Hopper, 993 F.2d 1246, 1252 (7th Cir.) (per curiam) holding on basis of Indiana law that attorney hired by bankruptcy trustee could not be held liable for attorney malpractice to third party), cert denied, 510 U.S. 868 (1993). [2] Plaintiffs cannot obtain the functional equivalent of privity as "Third-party beneficiaries" of the trustee's attorney-client relationship with his counsel. This would virtually destroy the privity doctrine.

Appellants' due process arguments are also without merit. Due [process is not offended simply because the law deprives a person of rights and remedies in certain circumstances.

III

A

The bankruptcy court correctly held that plaintiffs

---

[2] Under Texas law, the cases generally hold that attorneys are not liable to persons other than their clients for damages resulting from the performance of services that the attorney engages in and that require the office, professional training, skill, and authority of an attorney. Taco Bell Corp. V. Cracken, 939 F. Supp. 528, 532 (N.D. Tex. 1996) (Fitzwater, J.) (citing Martin v. Trevino, 578 S.W.2d 763, 771 (Tex. Civ. App. 19788, wirt ref' d n.r.e.)).

lacked standing to sue Milbank, the trustee, for claims that belong to the estate. In re Louisiana World Exposition, Inc., 832 F.2d 1391, 1397 (5th Cir. 1987).[3] Although there are circumstances in which an estate creditor can sue, plaintiffs did no follow the required procedure. Absent that, the court below did not err in holding that plaintiffs lacked standing. Plaintiffs, due process arguments also lack merit.

B

The bankruptcy court based dismissal of plaintiff's individual claims against Milbank on lack of standing. It concluded that plaintiffs were in fact asserting creditor complaints that did not belong to either Alphonso or to Janet. This court reviews the bankruptcy court's dismissal de novo. Wightman v. Texas Supreme Court, 84 F.3d188, 189 (5th Cir. 1996), cert, denied, __ U.S.___, 117 S.Ct. 744 (1997).

Although standing can be determined on the basis of more than the pleadings, see Barrett Computer Servs. Inc. V. PDA, Inc., 884 F.2d 214, 220 (5th Cir. 1989); Fed R. Civ. P. 12(b)(1), the bankruptcy court confined its ruling to pleadings alone, as in a Rule 12(b)(6) motion. Tr. At 3 ("In the dismissal, I have to construe the complaint of whether he can prove any set of facts that support his claims."); see Thompson v. County of Franklin, 15 F.3d 245, 247 (2d Cir. 1994) (noting distinction between assessment of standing under Rule 12(b)(6) and Rule 12(b) (1)). This precluded the bankruptcy court from dismissing plaintiffs' complaint unless, under the highly deferential standard of Conley v. Gibson, 355 U.S. 41, 45-46 (1957), and viewing the

---

[3] Plaintiffs complain that the bankruptcy court raised the standing issue sua sponte. Appellants Br. At 9. This was proper. See Barrett Computer Servs., Inc. V. PDA, Inc., 884 F.2d 214, 220 (5th Cir. 1989) (holding that issue of standing may be raised on court's own motion).

allegations of plaintiffs' complaint in the light most favorable to plaintiffs, see, e.g., Royal Bank of Canada v. FDIC, 733 F. Supp. 1091, 1094 (N.D. Tex 1990) (Fitzwater, J.), it could say beyond doubt that plaintiffs could establish no set of facts in support of their claims that would entitle them to relief. See e.g., In re Americana Servs. Inc., 173 B.R. 650, 652 (Bankr. W. D. Mo. 1994) (to grant Rule 12(b)(6) or Fed. R. Bankr. P. 7012 relief, it must be clear that no relief can be granted under any set of facts that could be proved consistent with the allegations).

The bankruptcy court's dismissal of Janet's claims on the basis that they belong to a creditor in problematic. According to plaintiffs' state-court petition, she is suing as a creditor, and is seeking damages that she contends she suffered individually. See e.g., Pet. at PP 19-20. The bankruptcy court could not have concluded , on the basis of the pleadings alone, that Janet lacked standing to bring her individual claims.

Although Alphonso's claims appear superficially to be estate claims, he alleges them as an individual see id at PP 7 & 32, and contends that he entitled to recover $2 million, id at P 32. According to Milbank, the schedules peg the estate's liabilities at $444,149.23 see Milbank Appellee Br. At 5, which would leave a surplus for Alphonso if his entitlement to damages is as considerable as he contends. This means that Alphonso may have an individual interest in the litigation that is not, as the bankruptcy court concluded, simply the complaint of a creditor. See McGuirl v. White, 86 F.3d 1232, 1234 (D.D. Cir. 1996); Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979). Although Milbank obviously disputes Alphonso's assertion, and posits that the estate is insolvent, the bankruptcy court rendered its decision based on the pleadings, and declined to decide whether the estate's assets had sufficient value to pay creditors in full. See Tr. At

3, 5.[4]

Although, the court vacates the portion of the dismissal order that dismisses plaintiffs' individual claims against the trustee, and remands that portion of the adversary proceeding to the bankruptcy court for further proceedings. The court suggests no view as to the merits of plaintiffs' claims or the other grounds for dismissal that the trustee advanced but that the bankruptcy court did not consider.

The bankruptcy court's summary judgment in favor of Wolffarth and Unell is AFFIRMED. The bankruptcy court's order dismissing plaintiff's action against Milbank is AFFIRMED IN PART and REMANDED IN PART.

March 5, 1997.

"s/_____"

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

---

[4] The bankruptcy court also rejected any of plaintiffs' claims based on actions taken by the trustee acting pursuant to court order. It is unclear from the state-court petition whether all of plaintiff's individual claims are based on court-approved acts.

Plaintiffs' constitutional arguments are without merit.

App. 38

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

IN RE	*	
ALPHONSO SOLOMON,	*	BK. NO. 394-33093-
	*	SAF-7
Debtor	*	

ALPHONSO SOLOMON, and	*	
JANET SOLOMON,	*	
INDIVIDUALLY ON BEHALF OF	*	
THE ESTATE OF	*	
ALPHONSO SOLOMON,	*	
Plaintiffs.	*	
	*	
V.	*	ADV. NO. 396-
	*	3173
ROBERT MILBANK, JR.,	*	
WM. CHRIS WOLFFARTH, and	*	
JENNA V. UNELL, ALL	*	
PERSONALLY AND	*	
INDIVIDUALLY,	*	
Defendants.		

July 16, 1996, Filed

ORDER OF DISMISSAL

On July 11, 1996 came on for hearing the Motion to Dismiss of Defendant Robert Milbank, Jr., the Chapter 7 Trustee. Present were Alphonso and Janet Solomon, Plaintiffs, and Defendant Robert Milbank, Jr. After considering the pleadings and the arguments of the Plaintiffs and the Defendant, the Court finds that the Plaintiffs do not have standing to assert the causes of action which they have plead and that good cause exist to dismiss the Plaintiff's Original Petition and the causes of action plead therein. Accordingly, it is

ORDERED that the Plaintiffs' Original Petition is dismissed, with each party to pay its own costs.

Signed this 12th day of July, 1996.

"s/_____"

Steven A. Felsenthal

United States Bankruptcy Judge

Submitted by:

Robert Milbank, Jr., Trustee

600 North Pearl, Suite 2460

Dallas TX 75201

(214) 880-8870